IN THE

Supreme Court of the United States

October Term, 1960.

No. 35.

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DUGAN & McNAMARA, INC.,
Respondent.

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

This case comes before the Court on writ of certiorari issued to review the final judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS OF THE COURTS BELOW.

The statements of the trial judge addressed to the jury at the close of the trial in connection with granting respondent's motion for judgment under Civil Rule 50 are printed at R. 13 to 17. The Court's order for judgment appears at R. 18.

The opinion of the Court of Appeals for the Third Circuit affirming the judgment of the Court below, filed on January 16, 1959 and later withdrawn, is reported in 1959 American Maritime Cases at page 411, but not in the Federal

Reporter, and appears at R. 20 to 21. The dissent of Chief Judge Biggs is printed at R. 21 to 26.

The order of the Court of Appeals granting leave to the petitioner to file a petition for rehearing out of time appears at R. 27 and 28. The order granting petitioner's request for a rehearing, vacating the judgment entered on January 16, 1959, withdrawing the opinion and dissenting opinion then filed, and permitting the parties to file supplemental briefs as to the effect of the decision of the Supreme Court of the United States in *Crumady v. The Joachim Hendrik Fisser, et al. v. Nacirema Operating Co., Inc.*, reported at 358 U. S. 423 (1959), appears at R. 31.

The final opinion of the Court of Appeals affirming the judgment of the Court below, filed on November 17, 1959 and reported at 272 F. 2d 823 (1960), is printed at R. 32 to 35, with the dissenting opinions of Chief Judge Biggs and two other members of the court beginning at R. 36.

JURISDICTION.

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the Third Circuit is provided in 28 U. S. C., Section 1254(1).

The final judgment of the United States Court of Appeals for the Third Circuit was entered on November 17, 1959 (R. 38). Petition for writ of certiorari was granted by this Court on March 28, 1960 (R. 39).

QUESTION PRESENTED.

May a shipowner, having paid damages to a longshoreman injured on its vessel, obtain indemnity for its loss against the stevedore whose breach of contract through substandard performance caused the injury to the longshoreman, there being no express contract between the shipowner and the stevedoring company for the unloading of the ship?

STATEMENT OF THE CASE.

The plaintiff longshoreman was injured in the hold of petitioner's vessel, Steamship ALEXANDRIA, while employed by respondent to discharge a cargo of bagged sugar. The evidence showed that the longshoreman was struck by bags of sugar falling from the stow by reason of the fact that his employer and its representatives in charge of the work had adopted a procedure which was improper and dangerous.[1]

The vessel had been chartered by petitioner as shipowner to the sugar refining company, which in turn had contracted through its subsidiary, as consignee, with the respondent stevedore to unload the cargo at Philadelphia[2] (R. 15, 35). There was no express contractual arrangement between the shipowner and the stevedoring company[3] (R. 12, 13, 21, 35).

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1. See comments of Chief Judge Biggs at R. 23 and 36.

2. This contractual relationship was disclosed during the trial to the trial judge, who accepted it as an established fact in the case in the course of his closing remarks to the jury (R. 15). Both Opinions and all Dissents in the Court of Appeals were predicated upon the existence of a contract between Dugan & McNamara, Inc., as stevedore, and National Sugar Refining Company as owner and consignee of the cargo (R. 21, 35). Respondent admits the contractual relationship in its Brief in Opposition to Petition for Writ of Certiorari, under Point V of Counter-Statement of the Questions Involved, at page 6.

3. The absence of contractual privity was stipulated during the trial in a sidebar conference (R. 12, 13). The sole question under consideration at that time was the existence of an express contract between petitioner and respondent. The Court of Appeals was incorrect in assuming, as it did, that whatever the contract arrangement may have been, "the shipowner * * * *claims no benefit under it*" (R. 21), or *"claims no standing under it."* (R. 34). Petitioner's counsel admitted that there was no contract, written or oral, between the shipowner and the stevedore, "though of course we deny its materiality under the cases." Counsel was not questioned, and did not state, whether he "claimed benefit" or "claimed standing" under the contract existing between the stevedore and the consignee of the cargo.

Previous to the trial, petitioner had settled the plaintiff's injury claim for a sum which respondent agreed was fair and reasonable (R. 14).

After both parties had presented their testimony, the trial judge sustained respondent's motion to dismiss, treating it as a motion for judgment under Civil Rule 50 (R. 17). The Court ruled as a matter of law that there was no right of indemnity without an express contract having been entered into between the shipowner and the stevedore (R. 15, 16).

The petitioner appealed, and the first argument thereon was heard by the Court of Appeals on June 10, 1958. By request of the court, the appeal was re-argued before the court *en banc* on December 1, 1958. In a Per Curiam opinion, the Court affirmed the Court below exclusively on the ground that no indemnity could be allowed as a matter of law because "any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between the parties, expressed or implied in fact" (R. 21).

Chief Judge Biggs, dissenting, stated that on the evidence the jury "would have been entitled to find, as contended by Waterman, that the 'direct, proximate, active and substantial cause of the accident' was the negligence of the stevedoring company," and that "indemnity for the shipowner need not necessarily be based on an express contract between the shipowner and the stevedoring company" (R. 23, 24).

Thereafter, this Court reversed the Court of Appeals for the Third Circuit in *Crumady v. The Joachim Hendrik Fisser, et al. v. Nacirema Operating Co., Inc., supra.*

The Court of Appeals then set aside the judgment herein, withdrew the first opinion and dissent upon petitioner's motion for rehearing, and heard reargument before the court *en banc* to consider the effect of the *Crumady* decision upon the present appeal (R. 31).

On November 17, 1959 the Court of Appeals decided, with the Chief Judge and two other members of the court dissenting, that the *Crumady* decision did not alter the requirement of contractual privity between the shipowner and the stevedore unless the stevedoring company, as in *Crumady*, had entered into a contract with the operator of the vessel (R. 32 to 35). The contract in the present instance having been made by the stevedoring company with the consignee of the cargo, the Court of Appeals affirmed the judgment of the Court below (R. 35).

ARGUMENT.

The Shipowner Is Justly Entitled to Benefit by the Stevedore's Warranty of Workmanlike Service Without Regard to Contractual Privity.

The principle that the shipowner is entitled to benefit by the stevedore's warranty of workmanlike service without regard to contractual privity has already been decided by this Court.

In *Crumady v. The Joachim Hendrik Fisser, et al. v. Nacirema Operating Co., Inc.*, 358 U. S. 423 (1959), the services of the stevedore had been contracted for by the charterer, as operator of the vessel. A longshoreman was injured due to substandard performance by the stevedoring company's employees, who brought into play a hazardous and unseaworthy condition of the ship's winch controls. The longshoreman recovered damages against the shipowner. This Court found that the shipowner was entitled to full indemnity from the stevedore, stating at pages 428-429 as follows:

> "A majority of the Court ruled in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, that where a shipowner and stevedoring company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service. And see *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563. • • •
>
> "We think this case is governed by the principle announced in the *Ryan* case. *The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not.* That is enough to bring the vessel into the

zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, Sec. 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.* at 133-134. See *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." (Emphasis supplied.)

The only factual difference between this case and the *Crumady* case is that in the present case the stevedore was engaged by the consignee of the cargo, rather than by the operator of the vessel as in *Crumady*. Such factual difference is immaterial, and indemnity should be granted to the shipowner (petitioner herein) just as it was in the *Crumady* case. The attempt of the Court of Appeals for the Third Circuit to restrict the holding of this Court in the *Crumady* case to contracts between the stevedore and an operator of the vessel is unjustified. In attempting to do so, the Court below stated (at R. 35):

"Thus, the actual holding of the *Crumady* case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the car-

riage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer *in invitum*. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tort-feasors and not one of indemnification for breach of warranty." (R. 35)

This misconception of the reasoning involved in the *Crumady* decision completely disregards the right of the shipowner as third-party beneficiary. Nothing in the language used by this Court in the *Crumady* case suggests an intention to limit the third-party beneficiary principle to contracts by stevedoring companies with ship operators. In the *Ryan* case this Court stressed the obligation of the stevedore to perform the contract in a workmanlike manner and allowed indemnity to the shipowner for breach of the stevedore's warranty of workmanlike service. In the *Ryan* case, the question of contractual privity did not arise, because the shipowner had directly engaged the services of the stevedore. In the *Crumady* case this Court again applied the analogy of the manufacturer's warranty to the stevedore's service and held that this warranty inured to the benefit of the shipowner regardless of contractual privity.

The Court of Appeals for the Third Circuit erred in failing to recognize that the privity rule had already been rejected by this Court, and then misapplied the *Crumady* decision by attempting to limit its scope.

Nor can this case and the *Crumady* case be distinguished on the ground that the action in *Crumady* was

against the vessel in rem, since the shipowner, whether he is sued in personam or defends as claimant of the vessel in a suit in rem, sustains like damages in either case as the result of the stevedoring company's breach of warranty.[4]

The Court below also erred in concluding that the shipowner and the stevedoring company in this case were "strangers" and that petitioner (shipowner) is, in effect, a joint tortfeasor barred from recovery of contribution. Rather than representing a "prohibited misuse of the concept of indemnity to obtain contribution," this case is identical in principle with the *Crumady* case.

The concept of a shipowner as "stranger" to the stevedore who discharges the cargo from his vessel, requiring the stevedore to make use of the ship's equipment and generally to perform one of the traditional duties of the crew, cannot be accepted. Although the stevedore may not contract directly with the shipowner, he does not come aboard the vessel as a trespasser. Someone having a direct interest in the business of the vessel has contracted for the stevedoring services, and whether the contract was made by the shipowner, the ship's operator, or the consignee of the cargo, the work of the stevedore is ultimately for the benefit of both the shipowner and himself. He comes aboard with the same authority to carry out the work as though the shipowner had directly contracted for the work and requested him to perform the services in a safe, proper and workmanlike manner.

Finally, in principle, irrespective of the *Crumady* case, the shipowner is entitled to indemnity from shore contractors regardless of contractual privity.

The shipowner's absolute and non-delegable duty to furnish a seaworthy vessel and equipment imposes a unique

4. Crumady sued Steamship JOACHIM HENDRIK FISSER, her engines, etc., in rem, and her owners Joachim Hendrik Fisser and/or Hendrik Fisser in personam. No service was made upon the individual respondents in personam. Upon attachment of the vessel in rem, Hendrik Fisser Aktien Gesselschaft appeared as owner and claimant.

and burdensome form of liability without fault. The shipowner, or the vessel in rem, is liable not only for furnishing unseaworthy premises and gear to workmen, but it has been held that liability for injuries to shore workmen may arise from accidents caused by defective appliances brought aboard by their own employer, *Alaska Steamship Co. v. Petterson*, 347 U. S. 396 (1954), and for the misuse of seaworthy equipment by longshoremen, *Grillea v. United States*, 232 F. 2d 919 (C. A. 2, 1956). As the orbit of liability increases, there is a corresponding increase of instances where the absolute liability of the vessel or shipowner for injuries caused by unseaworthiness is due entirely to the fault or acts of others.

The exposure of the shipowner to such claims is increased by his lack of actual control over the circumstances which create his liability. Merchant vessels are commonly placed by charter under the control of others than the shipowner, and charterers often transfer control and management of their ships to one or more subcharterers. Foreign owners frequently have no direct contact with the operation of their ships in American waters for months at a time.

Such far-reaching responsibility of the shipowner for the use of his vessel places him at an extreme disadvantage in dealing with claims of injury to shore workers arising from unseaworthiness, when such claims are due to substandard performance by shore contractors whom the shipowner did not employ, and with whom he had no actual privity. To deny indemnity in this situation is unjust and unreasonable. Every shipowner is entitled to indemnity for losses created by substandard performance by shore contractors, by virtue of his constantly increasing risk of loss under the warranty of seaworthiness which imposes liability without fault. Absence of contractual privity does not justify setting up a separate standard of recovery.

If the decision of the Court below is to stand, two identical ships at adjacent piers, employing the services of the same stevedoring company for loading or discharging

the same type of cargo, sued by longshoremen for injuries resulting from identical conduct amounting to breach of the stevedore's warranty of workmanlike service, would be allowed or denied indemnity solely on the point of privity. If the shipowner or operator of one ship had engaged the services of the stevedore, indemnity would be allowed. If the consignee of the cargo on the other ship had engaged the services, indemnity would be denied. This result is neither just nor realistic.

CONCLUSION.

The third-party beneficiary principle invoked in the *Crumady* decision (which controls this case) represents a logical and orderly development of contract law in the field of maritime relationships and furnishes needed relief to *all* shipowners exposed to the risk of loss by injury to shore workers through substandard performance of stevedoring contracts. It is not limited, as the Court of Appeals for the Third Circuit has held in this case, to owners and operators of ships, but applies to any contract which the stevedore may make, under which he goes aboard the vessel to render services. The law has been simply and directly stated by this Court in the *Crumady* case (358 U. S. at 428) as follows:

> "The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries."

Petitioner submits that the Court below erred in holding as a matter of law that petitioner, as shipowner, had no right of indemnity against the respondent stevedore without being a party to the contract for the services which were being performed aboard Steamship Afoundria when the longshoreman was injured, thereby causing loss to the

shipowner through alleged substandard performance by the stevedoring company.

Petitioner respectfully requests this Court to reverse the decision of the Court of Appeals for the Third Circuit, and to remand the proceeding for a new trial on the issue of substandard performance which was not submitted to the jury because of the summary judgment on the question of privity.

Respectfully submitted,

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Dated: August 15, 1960.
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